

MILLENIUM MEDICARE SERVICES**A****v.****NAGADEVAN MAHALINGAM****HIGH COURT MALAYA, JOHOR BAHRU****B****TEO SAY ENG JC****[CIVIL SUIT NO: 22-584-2007]****10 DECEMBER 2012**

CONTRACT: *Restraint of trade - Restrictive covenant clause - Allegation of breach - Whether clause in partnership agreement contravened s. 28 Contracts Act 1950 - Whether void and unenforceable - Whether clause falls under exception 2 of s. 28 Contracts Act 1950 - Dissolution of partnership - Whether agreement made upon or in anticipation of dissolution of partnership - Whether there was specific clause dealing with dissolution of partnership - Whether claim sustainable - Partnership Act 1961, ss. 34, 35, 36 & 37*

C**D**

PROFESSIONS: *Medical practitioners - Restraint of trade - Restrictive covenant clause in agreement - Allegation of breach - Whether clause in partnership agreement contravened s. 28 Contracts Act 1950 - Whether void and unenforceable - Whether clause falls under exception 2 of s. 28 Contracts Act 1950 - Dissolution of partnership - Whether agreement made upon or in anticipation of dissolution of partnership - Whether there was a specific clause dealing with dissolution of partnership - Whether claim sustainable - Partnership Act 1961, ss. 34, 35, 36 & 37*

E**F**

PARTNERSHIP: *Agreement - Restrictive covenant clause - Restraint of trade - Allegation of breach - Whether clause in agreement contravened s. 28 Contracts Act 1950 - Whether void and unenforceable - Whether clause falls under exception 2 of s. 28 Contracts Act 1950 - Dissolution of partnership - Whether agreement made upon or in anticipation of dissolution of partnership - Whether there was specific clause dealing with dissolution of partnership - Whether claim sustainable - Partnership Act 1961, ss. 34, 35, 36 & 37*

G**H**

WORDS AND PHRASES: *“dissolution of partnership” - Meaning of - Whether clearly means official ending of partnership - Partnership Act 1961, ss. 34, 35, 36 & 37*

I

A The plaintiff was a partnership running the business of Health
Care Centre with the principal place of business at Bandar Baru
Permas Johor along with several branches within the state. The
defendant was a registered medical practitioner, to wit, a medical
B doctor. By a partnership agreement ('the agreement') entered into
between the plaintiff and the defendant, the defendant agreed to
join the plaintiff as a partner commencing on 1 November 2006
for two years. However, by a letter dated 5 February 2007, the
defendant had given three months notice to resign and withdraw
C as a partner of the plaintiff with effect from 5 May 2007. The
defendant stopped working and had been absent from his duty
since April 2007 and started practising as a medical practitioner at
Klinik Medic Care which was within the radius of 15km from one
of the plaintiff's branches. The plaintiff thus obtained an *inter*
partes interim injunction against the defendant to restrain the
D defendant from doing so. The plaintiff alleged that the defendant
had breached cl. 11(iii) of the agreement entered into between the
plaintiff and the defendant. The defendant, however, contended
that cl. 11(iii) was a restraint of trade clause which had
contravened s. 28 of the Contracts Act 1950 ('Contracts Act')
E and was therefore void and unenforceable. The issues that arose
for adjudication were (i) whether the current case fell under
exception 2 of s. 28 of the Contracts Act; and (ii) whether the
plaintiff was entitled to damages.

F **Held (dismissing plaintiff's claim):**

- (1) Exception 2 of s. 28 of the Contracts Act only applies to an
agreement made between partners. Although the defendant fell
under the word 'partners' in exception 2, the said exception
only applies in specific circumstances (where the existing
G partners knew or had knowledge that the partnership practice
will be dissolved, and had entered into an agreement not to
compete with one another) but it did not apply where a single
partner leaves the partnership and the partnership still
continues. (para 18)
H
- (2) The literal meaning of "dissolution of partnership" clearly
means the official ending of a partnership. The Partnership Act
1961 ("Partnership Act") provides for four situations where a
partnership can be dissolved *ie*, dissolution by expiration or
I notice, dissolution by bankruptcy, death or charge, dissolution
by illegality of partnership and dissolution by the court. The

- provisions of ss. 34 to 37 of the Partnership Act does not cover a situation where a partner leaves a partnership and the other partners remain and the partnership continues. (paras 20 & 21) A
- (3) Exception 2 to s. 28 of the Contracts Act 1950 is meant to cover two situations (i) upon the dissolution of partnership; and (ii) in anticipation of a dissolution of partnership. Evidence showed that the purpose of the partnership agreement herein was to admit the defendant as a working partner of the partnership practice. There was no discussion between the plaintiff and the defendant of any possibility of the partnership being dissolved in the near future. There was also no specific clause which dealt with the dissolution of the partnership practice. (paras 32-34) B
C
- (4) Clause 2(ii) of the agreement only governs the termination of the partnership agreement between the plaintiff and the defendant but not the dissolution of the partnership. There was not an iota of evidence that this partnership agreement was made in anticipation of the dissolution of the partnership practice then or in the near future. Neither was there any such inference that could be drawn from the facts adduced that the parties expected that the dissolution of the partnership would probably happen and they had prepared for it at the time of the execution of the partnership agreement. (para 35) D
E
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- (5) It must be satisfied that the agreement which contains the restraint of trade clause must be made upon or in anticipation of the dissolution of the partnership practice which the plaintiff failed to prove on the balance of probabilities. The plaintiff's claim was therefore unsustainable. Thus, the answer to the issue as to whether the plaintiff was entitled to damages was in the negative. (paras 50-52) G
- Case(s) referred to:** H
Deacons v. Bridge [1984] 2 All ER 19 (*refd*)
RHB Bank Bhd v. Kwan Chew Holdings Sdn Bhd [2010] 1 CLJ 665 FC (*refd*)
- Legislation referred to:** I
Contracts Act 1950, s. 28
Evidence Act 1950, ss. 101, 103
Partnership Act 1961, ss. 34, 35, 36, 37

A For the plaintiff - Pang Kong Seng; M/s KS Pang & Co
For the defendant - Mohd Faizal Ahmad; M/s Hazelin & Assocs

Reported by Suhainah Wahiduddin

B

JUDGMENT

Teo Say Eng JC:

Background

C

[1] In this case, the plaintiff is claiming against the defendant for:

D

(a) A permanent injunction to restrain the defendant from practising as a medical practitioner as a sole proprietor or partner or employee within the 15km radius from the plaintiff's following branches:

E

(i) No. 63, Jalan Permas 10/11, Bandar Baru Permas Jaya, 81750 Masai, Johor;

(ii) No. 97, Jalan Bakawali 50, Taman Johor Jaya, 81100 Johor Bahru, Johor;

F

(iii) No. 16, Jalan Johar 3, Taman Desa Cemerlang, 81800 Ulu Tiram, Johor; and

(iv) No. 19, Jalan Mawar, 81750 Masai, Johor.

(b) Damages to be assessed;

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(c) Costs to be taxed and to be paid forthwith; and

(d) Any other relief this Honourable Court deems fit and proper.

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[2] The plaintiff has obtained an *inter-partes interim* injunction against the defendant on 17 September 2007 to restrain the defendant from practising as a medical practitioner as a sole proprietor or a partner or an employee within the radius of 15 km from the plaintiff's branches stated above until 4 May 2010.

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[3] The plaintiff submits that since the date of trial was fixed after 4 May 2010, therefore the prayer for permanent injunction is irrelevant and the relevant relief now is the damages.

[4] The plaintiff alleges that the defendant has breached cl. 11(iii) of the partnership agreement entered into between the plaintiff and the defendant. A

[5] The defendant contends that cl. 11(iii) is a restraint of trade clause which has contravened s. 28 of the Contracts Act 1950 and is void and unenforceable. B

The Issues

[6] The parties have agreed that the issues for adjudication are as follows: C

(a) Whether the current case falls under exception 2 of s. 28 of the Contracts Act 1950; and

(b) Whether the plaintiff is entitled to damages. D

Facts Not In Dispute

[7] The plaintiff is at all material times a partnership running the business of Health Care Centre with the principal place of business at No. 63, Jalan Permas 10/1, Bandar Baru Permas Jaya, 81750 Masai, Johor. The plaintiff is also running the said business at the branches of the following address: E

(a) No. 97, Jalan Kawali 50, Taman Johor Jaya, 81100 Johor Bahru, Johor; F

(b) No. 16, Jalan Johor 3, Taman Desa Cemerlang, 81800 Ulu Tiram, Johor; and

(c) No. 19, Jalan Mawar, 81750 Masai, Johor.

[8] The defendant at all material times is a registered medical practitioner, to wit, a medical doctor residing at No. 73, Jalan Medical Perwira 7, Taman Ungku Tun Aminah, 81300 Skudai, Johor. G

[9] By the agreement dated 1 November 2006 (P3) (pp. 1 - 20 the plaintiff's bundle of documents "G") entered into between the plaintiff and the defendant, the defendant had agreed to join the plaintiff as a partner commencing on 1 November 2006 for two years from the said date subject to the terms of the said agreement dated 1 November 2006. H
I

A [10] Under cl. 2(i) of the agreement, the partnership shall be deemed to have commenced on 1 November 2006.

B [11] It is an express term of the said agreement dated 1 November 2006 that the defendant as a partner shall not practise as a medical practitioner by setting up any medical practice himself or as a partner or as an employee within the radius of 15km from any of the plaintiff's branches stated above within three years after the defendant has ceased to be a partner of the plaintiff.

C [12] Clause 11(iii) of the agreement dated 1 November 2006 states that:

No partner shall without the written consent of the Managing Partner:

D (iii) set up any medical practice within three (3) years after ceasing to be partner within a radius of 15 KM from any partnership clinics as medical practitioner either by himself or as a partner or employee of any person or company;

E [13] By the letter dated 5 February 2007 (P5) (p. 51 of the plaintiff's bundle of documents "G") the defendant had given three months notice to resign and withdraw as a partner of the plaintiff with effect from 5 May 2007 under cl. 2(ii) of the agreement which reads as follows:

F The working partnership shall be extended on a yearly basis from the date of expiry. Either the managing partner or Dr. Nagadevan may terminate the partnership by giving three (3) months notice in advance to the other. If no notice of termination was given by either of them three (3) months prior to the expiry of the partnership then in such event the parties have agreed or deemed to have agreed to continue the partnership on a yearly basis period from the date of expiry subject to the same terms and conditions.

H [14] The defendant had stopped working or had been absent from his duty since early of April 2007 and he had practised as a medical practitioner at Klinik Medic Care at No. 30, Jalan Johor 3/2, Taman Desa Cemerlang, 81800 Ulu Tiram, Johor within the radius of 15km from one of the plaintiff's branches at No. 16, Jalan Johor 3, Taman Desa Cemerlang, 81800 Ulu Tiram, Johor. This is shown in the letter dated 6 November 2007 from the Kementerian Kesihatan Malaysia (P6) (pp. 26 - 27 the plaintiff's bundle of documents "G").

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Evaluation Of Issues For Determination

A

Whether The Current Case Falls Under Exception 2 Of s. 28 Of The Contracts Act 1950

[15] It is not in dispute that cl. 11(iii) of the partnership agreement which restrained the defendant from setting up any medical practice within three years after ceasing to be a partner within a radius of 15km from any partnership clinics as medical practitioner either by himself or as a partner or employee of any person or company is a restraint of trade clause which is void and unenforceable under s. 28 of the Contracts Act 1950. However, the plaintiff submits that such an agreement falls under exception 2 of s. 28 of the Act.

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C

[16] For ease of reference, I shall set out below s. 28 of the Contracts Acts 1950 together with its exception 1 and 2:

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Every agreement by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void.

Saving of agreement not to carry on business of which good will is sold

E

Exception 1 - One who sells the goodwill of a business may agree with the buyer to refrain carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein:

F

Provided that such limits appear to the court reasonable, regard being had to the nature of the business **of agreement between partners prior to dissolution**

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Exception 2 - Partners may, upon or in anticipation of a dissolution of the partnership, agree that some or all of them will not carry on a business similar to that of the partnership within such local limits as are referred to in exception 1.

[17] In order to invoke exception 2 to s. 28 of the Contracts Act 1950, the following requirements must be complied with:

H

1. Partners

Exception 2 only applies to an agreement made between partners. The defendant must be a partner at the time of the execution of the Partnership Agreement.

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- A 2. The restrictive covenant must be made upon or in anticipation of a dissolution of the partnership.
3. Within such local limits as are referred to in exception 1.

B The validity of the restraint of trade clause is subject to the reasonableness test as envisaged by the use of the words “within such local limits as are referred to in Exception 1.

The Burden of Proof

C [18] Since the plaintiff alleges that the current case falls under exception 2 of s. 28 of the Contracts Act 1950, the burden of proof rests with him under ss. 101 and 103 of the Evidence Act 1950.

D (1) *First Requirement:*

Whether the defendant was a partner at the time of the execution of the partnership agreement exh. P3.

E The plaintiff submits that the word ‘partners’ should include those who become such upon execution of the partnership agreement.

F The moment the defendant executed the agreement, he has become a partner of the firm (the plaintiff) and the agreement is binding on him. The plaintiff further submits that it makes no sense to say that the defendant was not yet a partner of the firm when he executed the agreement. This is further strengthened by cl. 2(i) of the agreement.

G The new partnership shall be deemed to have commenced on the 1st day of November, 2006 and shall continue for a term of two (2) years from that date. At the end of the said two (2) year term, the partnership shall continue on yearly basis.

H I agree with the plaintiff’s submission and hold that the defendant falls under the word ‘partners’ in exception 2 of s. 28.

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(2) *Second Requirement:*

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In determining whether the agreement was made upon or in anticipation of a dissolution of a partnership, it is necessary to decide whether the phrase ‘dissolution of a partnership’ means the whole partnership must be dissolved or one or several partners resign from a partnership and the partnership still continues as contended by the plaintiff?

B

The plaintiff submits that it is not necessary that the whole partnership must be dissolved in order to invoke the said exception.

C

The plaintiff submits that the defendant in this case had resigned/withdrawn as a partner of the plaintiff’s firm.

Although the plaintiff has not been dissolved pursuant to cl. 26 of the agreement (P3) and because apart from the defendant, there are other partners remaining.

D

The plaintiff therefore submits that as far as the defendant is concerned, the partnership between the defendant and the other partners was dissolved.

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The defendant in reply submits that exception 2 only applies in specific circumstances (where the existing partners knew or having knowledge that the partnership practice will be dissolved, entered into an agreement not to compete with one another) but it does not apply where a single partner leaves the partnership and the partnership still continues.

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Ruling By The Court

[19] In interpreting the phrase ‘dissolution of partnership’ a literal approach should be adopted.

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[20] The word ‘dissolution’ as defined in *Collins Cobuild English Dictionary* to mean: “the act of officially ending a formal agreement, for example a marriage or a business arrangement”. The literal meaning of “dissolution of partnership” clearly means that the official ending of a partnership. Dissolution of partnership and its consequences are governed by s. 34 to s. 37 of the Partnership Act 1961. The act only provides four situations where a partnership can be dissolved, namely:

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- A (a) Dissolution by expiration or notice;
(b) Dissolution by bankruptcy, death or charge;
(c) Dissolution by illegality of partnership; and
- B (d) Dissolution by the court.

C [21] It is clear that these provisions that is ss. 34 to 37 of the Partnership Act 1961 does not cover a situation where a partner leaves a partnership and the other partners remain and the partnership continues. In the circumstances, the interpretation of the phrase 'dissolution of partnership' by the plaintiff, is therefore not acceptable.

D [22] Even if the phrase 'dissolution of a partnership' could give rise to two interpretations as contended by the plaintiff I am still of the view that the phrase should be read *contra proferentem* the plaintiff who relied upon the said clause and the interpretation which is favourable to the defendant should be adopted.

E [23] Be that as it may, I am still of the view that the plaintiff must still prove on the balance of probabilities from the evidence adduced that the said agreement was entered into upon or in anticipation of a dissolution of partnership. The word 'anticipate' means 'to think that something will probably happen or to guess that something will happen and be ready to deal with it.'

F [24] The phrase 'in anticipation of something' if you do something in anticipation of an event, you expect it to happen and you prepare yourself for it:

G [25] See *Macmillan English Dictionary for Advanced Learners*. Applying the above meanings to our present case, 'in anticipation of the dissolution of a partnership' clearly means that you expect that a dissolution of the partnership will probably happen and you prepare yourself for it.

H [26] Whether or not the partnership agreement in this case was entered into between the plaintiff and the defendant upon or in anticipation of the dissolution of the partnership is a question of fact to be determined from the evidence adduced.

I

The Plaintiff's Submission

A

[27] The plaintiff submits that the parties have anticipated a dissolution of the partnership when they signed the partnership agreement which can be seen from the evidence adduced through SP1 that is Dr. Yap Cheng Kwee. The plaintiff points out that Dr. Yap Cheng Kwee (SP1) who has signed the agreement (P3) told the court that the intention to put the cl. 11(iii) in the agreement (P3) was that all parties were to understand that upon admission of the defendant as a new partner of the plaintiff, the defendant should not set up any form of practice as a medical practitioner by himself or as a partner or employee or any person or company within 15km radius from any branches of the plaintiff for three years after ceasing to be a partner.

B

C

[28] The plaintiff further submits that cl. 2(ii) of the (P3) provides that either party may terminate the agreement by giving three months notice.

D

This clearly shows that termination or dissolution was in the mind of the parties/partners upon execution of the agreement (P3).

E

[29] The plaintiff further submits that the fact that dissolution was in the mind of the parties was further strengthened by the evidence of DW1 when DW1 told the court that he agreed when a partnership was formed, the inevitable consequence in years to come was either the partnership subsisted or the partnership dissolved. He also agreed that naturally that was within the contemplation of all partners when a partnership was formed.

F

He further agreed that when a partner entered into a partnership or signed a partnership agreement, he would have anticipated that the partnership would continue or the partnership would dissolve in the future.

G

The Defendant's Submission

[30] The defendant submits that the plaintiff has failed on the balance of probabilities to prove its assertion that exh. P3 was entered into in anticipation of the partnership practice being dissolved based on the evidence adduced in court:

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A Evidence Adduced

1. During the trial, the plaintiff's sole witness (SP1), had admitted under cross-examination that exh. P3 was the only partnership agreement signed by the parties.

B 2. Under cross-examination (SP1) further admitted that the purpose of the partnership agreement (exh. P3) was to admit the defendant as a working partner of the partnership practice.

C 3. This fact is supported by the presence of cl. 6 of the recital to exh. P3 that reads:

(6) The old Partners are willing to admit Dr. Nagadevan as a working partner of the Partnership Practice and Dr. Nagadevan has agreed to be the working partner of the said partnership practice subject to the terms and conditions hereinafter contained the partners in the new partnership are referred to as the partners.

D

[Refer to p. 2 of bundle G]

E 4. In his testimony, the defendant in his witness statement had told this Honourable Court *inter alia* that:

8(Q) – Apart from admitting you as a new working partner, did Dr. Yap Cheng Kwee or any of the other old partners inform you at that material time of any other reasons for entering into the Partnership Agreement?

F

(A) – Yang Arif, no other reasons were offered at that point in time. I believe that the only reason for doing so was to admit me as a new partner of the Plaintiff's Partnership Practice.

G

9(Q) – Dr. Naga, was there any indication at that point in time that the parties were alluding to the possibility of the Partnership Practice being dissolved sometime in the near future?

H

(A) – Certainly not, Yang Arif, otherwise I would not have joined a Partnership Practice or rather agreed to become its new partner knowing full well that it was about to be dissolved in not too distant a future.

I

[Refer to Q & A (8) and (9) of J]

[31] In the same vein, the defendant also told this court during re-examination that: A

... when we signed the agreement it was just the beginning of the Partnership. The entire firm was formed 2 weeks before I joined in as a partner. And during the signing of the agreement the main discussion was expansion of the partnership by bringing in new partners and opening up of new clinics, I was told if in case there is any problem with the partnership I was supposed to manage all the clinics. So there was no discussion about dissolution at all. B

Finding By The Court C

[32] Having considered the submissions by the respective parties I find that the plaintiff's submission that when a partner entered into a partnership or signed a partnership agreement he could have anticipated that the partnership would continue or the partnership would dissolve in the future is totally without merits. If such a view was correct, it would mean that all partnership agreements were deemed to have made in anticipation of the dissolution of partnership whenever every partner who entered into a partnership agreement could have anticipated that the partnership would continue or the partnership would dissolve in future. D E

[33] I am of the considered view that exception 2 to s. 28 of the Contracts Act 1950 is meant to cover two situations, that is: F

- (a) Upon the dissolution of a partnership; and
- (b) In anticipation of a dissolution of a partnership.

[34] Whether the agreement was made upon or in anticipation of the dissolution of partnership is a question of fact to be determined on the facts adduced. G

[35] A perusal of the evidence adduced shows the following:

- (i) The purpose of the partnership agreement was to admit the defendant as a working partner of the partnership practice. H
- (ii) There was no discussion between the plaintiff and the defendant of any possibility of the partnership being dissolved in the near future. I
- (iii) Exhibit P3 does not contain a specific clause which deals with the dissolution of the partnership practice.

- A (iv) Clause 2(ii) of the partnership agreement only governs the termination of the partnership agreement between the plaintiff and the defendant but not the dissolution of the partnership.

B From the evidence adduced, I find that there was not an iota of evidence that this partnership agreement was made in anticipation of the dissolution of the partnership practice then or in the near future. Neither any such inference can be drawn from the facts adduced that the parties expected that the dissolution of the partnership would probably happen and they had prepared for it at the time of the execution of the partnership agreement.

- C (v) On the issue whether the plaintiff specifically pleaded facts that bring this case within the exception 2 of s. 28 of the Contracts Act?.

D [36] The defendant contends that the statement of claim does not plead facts which bring or support its claim that the parties had entered into exh. P3 in anticipation of the partnership practice being dissolved.

E [37] It is trite law that the parties are bound by their own pleadings: See *RHB Bank Bhd v. Kwan Chew Holdings Sdn Bhd* [2010] 1 CLJ 665 at p 679; [2010] 2 MLJ 188 at p. 190.

F [38] The plaintiff in reply argues that the plaintiff has pleaded the existence and effect of the agreement (P3) at paras. 3 and 4 of the statement of claim.

G [39] The plaintiff further submits that to determine whether the parties were in anticipation of a dissolution of the partnership when the agreement was signed, the court has to probe into the state of mind of the parties.

[40] This is a matter of evidence for the court to consider which need not be pleaded.

H **Ruling By The Court**

I [41] I agree with the submission of the defendant that the plaintiff has failed to plead facts that the parties had entered into P3 in anticipation of the partnership practice either in his statement of claim or in his reply to the defence.

[42] Be that as it may, I find that neither did the plaintiff adduce sufficient evidence to prove that such an agreement was entered into upon or in anticipation of the dissolution of the partnership practice. A

[43] I therefore find that on this ground alone that the plaintiff's claim is unsustainable. B

Third Requirement:

Whether The Local Limits Imposed By The Restrictive Covenant Was Reasonable In The Circumstances With Regard To The Nature Of The Business C

Plaintiff's Submission

[44] The plaintiff submits that in the current case, the territory limit is only within 15km radius from the plaintiff's branches and duration is only for three years. D

[45] The plaintiff cited the Privy Council's decision in *Deacons v. Bridge* [1984] 2 All ER 19 (pp. 15 to 22 the plaintiff's bundle of authorities) which has a similar facts to support its contention. E

[46] In *Deacons* case, the plaintiff was a firm of solicitors in Hong Kong with 27 partners. The defendant was one of the partners of the plaintiff's firm. The partnership agreement contained a restrictive covenant which states that if a partner ceased to be a partner, he was not to act as a solicitor in Hong Kong for a period of five years for any client of the firm or any person who had been a client in the three years preceding his departure from the firm. In 1982, the defendant resigned as a partner and set up a practice in Hong Kong which he commenced acting for former clients of the plaintiff who sought an injunction to enforce the restrictive covenant. F
G

[47] The High Court granted the injunction. The injunction was upheld by the Court of Appeal. H

[48] The Privy Council applied the "reasonableness test" and upheld the injunction and ruled that the scope and duration of the restraint of trade was not unreasonable. Whereas in the Privy Council case, the territory limit is the whole Hong Kong and the duration is for five years. I

A [49] This clearly shows that the limit imposed by cl. 11(iii) is reasonable.

B [50] Based on the authority cited, I agree that the territory limit imposed by cl. 11(iii) is reasonable. However, being reasonable by itself is not enough to invoke exception 2 to s. 28, it must be satisfied that the agreement which contains the restraint of trade clause must be made upon or in anticipation of the dissolution of the partnership practice which the plaintiff had failed to prove on the balance of probabilities.

C **Issue No. 2**

[51] Since I have decided the first issue in the negative, the answer to the second issue will also be in the negative.

D **Decision**

E [52] From the evidence adduced in totality, I find that the plaintiff has failed to prove its claim on the balance of probabilities against the defendant. In the circumstance, I dismiss the plaintiff's claim with cost of RM8,000.

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